

STATE OF OKLAHOMA, et al.,
Petitioner
v.

STATE OF OKLAHOMA, et al.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner
v.

STATE OF OKLAHOMA, et al.

**On Writs of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

**STATE OF RESPONDENTS
THE STATE OF OKLAHOMA,
OKLAHOMA SCENIC RIVERS COMMISSION,
OKLAHOMA POLLUTION CONTROL
COMMISSIONING BOARD AND
SAVE THE ILLINOIS RIVER (S.T.I.R.)**

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QUESTIONS PRESENTED

1. Whether the Clean Water Act requires a point source discharger to comply with EPA-approved water quality standards of affected downstream states in a permit proceeding under the National Pollutant Discharge Elimination System (NPDES);
2. Whether the EPA failed to properly consider the existing degradation in the Illinois River in Oklahoma when considering Fayetteville's application for an NPDES permit to discharge additional pollutants to that River, and as a result of this failure, incorrectly applied Oklahoma's standards prohibiting any degradation of that River; and
3. Whether the Court of Appeals correctly applied Oklahoma's EPA-approved standards, prohibiting any degradation of a state-designated scenic river, to a situation where the River was already degraded, and where EPA had found that additional pollutants of the kind that had contributed to the existing degradation would reach the River from the new discharge.

(i)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 90-1262

STATE OF ARKANSAS, *et al.*,
Petitioner
v.

STATE OF OKLAHOMA, *et al.*

No. 90-1266

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Petitioner
v.

STATE OF OKLAHOMA, *et al.*

On Writs of Certiorari to the
United States Court of Appeals
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BRIEF OF RESPONDENTS
THE STATE OF OKLAHOMA,
THE OKLAHOMA SCENIC RIVERS COMMISSION,
THE OKLAHOMA POLLUTION CONTROL
COORDINATING BOARD AND
SAVE THE ILLINOIS RIVER (S.T.I.R.)

STATEMENT

Introduction. Fayetteville, Arkansas seeks to achieve its water quality goals at Oklahoma's expense.* Fayetteville's old water treatment plant discharged all of its treated effluent into the White River in Arkansas. By

the early 1980s, the White River was experiencing water quality problems. Moreover, in 1984 Arkansas adopted more protective water quality standards for the White River. Fayetteville decided to build a new, more modern plant. But Arkansas could not achieve its goal of improving the quality of the White River up to the level to satisfy the new 1984 standards if Fayetteville discharged all of its effluent to that river. So Fayetteville asked the EPA for permission to transport half its discharge to another river—the Illinois River—which flows from Northwestern Arkansas into Oklahoma.

Even when it applied for a grant to build the new plant, Fayetteville informed EPA that the Illinois River in Oklahoma was already degraded, largely by phosphorous and other pollutants originating in other Arkansas communities. Fayetteville told EPA that if it got its permit, the new discharge to the Illinois River would further degrade the condition of the River in Oklahoma and violate Oklahoma's water quality standards. And, after a hearing on Fayetteville's permit application where EPA received unrefuted evidence (including photographs) that the Illinois River was degraded, EPA entered a finding that up to a fourth of all the new pollutants discharged into the River would be available as food for additional algae growth in Oklahoma. Nevertheless, EPA issued the permit. Oklahoma asks this Court to affirm a Tenth Circuit ruling that held the permit unlawful under the Clean Water Act and to protect the already degraded Illinois River from further pollution from Fayetteville.

Legal Framework. The Clean Water Act has as its goal the "restoration and maintenance of the chemical, physical and biological integrity of the Nation's waters," through the elimination of the discharge of pollutants. CWA § 101.¹ "Pollutant" is defined broadly by Congress

¹ By its choice of the word "integrity," Congress intended to convey "pristine." "In those water bodies which are not pristine, it should be the national policy to take those steps which will re-

to include "industrial, municipal, and agricultural waste discharged into water." CWA § 502(6).² To achieve its goal, Congress imposes a nationwide prohibition on the discharge of any pollutant. CWA § 301. The only exceptions to this no discharge prohibition arise when an aspiring discharger can prove that it can satisfy statutory requirements known as "effluent limitations," which are restrictions on "the quantities, rates, and concentrations" of substances discharged from point sources. CWA §§ 301, 502(11). There are two types of effluent limitations.

First, the discharger must satisfy technology-based effluent limitations, which the Act requires the EPA to promulgate. Second, a permit applicant must show that it can comply with "any more stringent" limitations "required to implement" EPA-approved water quality standards. CWA § 301(b)(1)(C) (emphasis added). Water quality standards are key to achieving the Act's goals. Because technology-based limitations take into account only existing technology, it would be possible for a discharger to satisfy them, and nevertheless harm the quality of the receiving waters, depending on the nature of his discharge and the aquatic qualities of the receiving stream. Water quality standards, on the other hand, are based on the amounts and kinds of pollutants in the waters to which discharges flow as well as on desired water quality. *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 109-10 (D.C. Cir. 1987). Limitations that must be imposed to implement water quality standards need not be based on technology, and they thus

sult in change towards that pristine state in which the physical, chemical, and biological integrity of the water body can be said to exist." S. Rep. No. 414, 92nd Cong., 2d Sess. (1972), reprinted in 2 Sen. Comm. on Public Works, 93rd Cong., 1st Sess., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972, at 1494 (1973) (hereinafter, 1972 LEGIS. HIST.).

² The Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988), is cited by section number in this brief. Parallel citations to the United States Code are provided in the Table of Authorities.

fine-tune the permit process to insure protection of water quality, and, ultimately, realization of the Act's goals. Both technology based effluent limitations, and limitations based on mandatory compliance with EPA-approved water quality standards, are enforced through an NPDES permit proceeding. CWA § 402. If an applicant is unable to demonstrate that it will implement water quality standards, the "no discharge" prohibition applies and the permit must be denied, even if the applicant is in compliance with technology-based limitations. See *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 588 (D.C. Cir. 1980) (Congress placed great reliance on the permit process as the means of finally achieving water quality standards.).

States have primary responsibility to "prevent, reduce, and eliminate pollution." CWA § 101(b). While EPA develops the technological guidelines that establish national minimum requirements for pollution control, the states adopt standards specifically tailored to the needs of individual bodies of water.³ At least once every three years, each state must hold public hearings to adopt standards that "enhance the quality of water and serve the purposes of this Act." CWA § 303(c). They are then submitted to the EPA Administrator, who approves them if "consistent with the requirements of the Act." When approved, the standards "shall thereafter be the water quality standard[s] for the applicable waters of the State." CWA § 303(c) (3). EPA may not disapprove, or subsequently soften, standards because they are more protective of water quality than the technological limitations. The Act encourages states to "require purer water," and to "embody this judgment in binding 'water

³ The EPA is also authorized to set effluent limitations based on water quality when technology-based limitations do not suffice to achieve a minimum quality of water. However, the imposition of such limitations does not delay or relieve a discharger from compliance with more protective state water quality standards approved by EPA pursuant to CWA § 303. CWA § 302(e). See *Homestake Mining Co. v. EPA*, 477 F. Supp. 1279, 1285-86 (D.S.D. 1979).

quality standards' that must be respected in the drafting of a permit [under] § 301(b)(1)(C)." *Montgomery Envtl. Coalition v. Costle*, 646 F.2d at 574-75.

Each state's water quality standards must have at least three components: (1) designated uses to be "achieved and protected," e.g., warm water fishery; (2) water quality criteria, expressed in numerical or narrative form, which reflect the limits on the quantities of pollutants in a body of water that are necessary to protect designated uses; and (3) an antidegradation policy. 40 C.F.R. § 131.10-19 (1990). The purpose of this antidegradation policy is to insure protection of rivers whose quality exceeds that necessary to protect its designated uses. Since the Illinois River in Oklahoma is such a river, this policy is of critical relevance to this proceeding.

The structure of the antidegradation policy is like a pyramid. At the base, states must insure the level of water quality necessary to protect existing uses. *Id.* at § 131.12(a)(1). At the next level, EPA mandates a higher level of protection for waters whose quality exceeds that necessary to support propagation of fish, shellfish, wildlife and recreation. The quality of these waters must be maintained and protected, unless the state makes a determination that allowing lower water quality is necessary to accommodate economic and social development.⁴ Finally, for waters at the top of the pyramid, *no degradation* from a point source may be permitted under any circumstances, even to accommodate economic development. These waters, designated by the states, are high quality waters that constitute "an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance." ("ONRW" waters) *Id.* at

⁴ But even when a state makes such a determination, EPA requires the state to fully protect existing uses, and to achieve the highest statutory and regulatory requirements for new and existing point sources. *Id.* at § 131.12(a)(2).

§ 131.12(a)(3).⁵ EPA projects this three-tiered system onto the states by requiring each state to adopt a policy that "at a minimum" is consistent with it. 40 C.F.R. § 131.12(a).⁶

The Act places upon the states primary responsibility to restore the integrity, the natural state, of the Nation's waters. Since many rivers flow across state lines, however, state lines must not stand as artificial barriers to this goal, as would occur if dischargers were able to achieve their desired level of water quality by violating the water quality standards of downstream states. As recognized by both EPA and the court of appeals in this proceeding, the Act insures that this does not happen by requiring that dischargers unequivocally comply with EPA-approved water quality standards of affected downstream states. CWA § 301(b)(1)(C). First Order on Petition For Review (EPA), P.A. 115a-121a, Court of Appeals, P.A. 29a-43a.⁷

This proceeding. Fayetteville operated a waste water treatment plant, constructed in 1969, which discharged all its effluent into the White River in Arkansas. This discharge over the years contributed to water quality problems, particularly algae growth due to the release of

⁵ EPA requires states to "maintain and preserve" these waters. *Id.* at § 131.12(a)(3). Until 1983, EPA regulations provided that "no degradation" would be permitted in an ONRW. The language was changed in 1983 to permit temporary activities such as construction projects. EPA intends through the amended language to continue the prohibition of *any* degradation of these waters by a point source or other permanent source. 48 Fed. Reg. 51,399, 51,403 (1983).

⁶ EPA also requires that each state insure that its standards provide for the "attainment and maintenance of water quality standards of downstream waters." *Id.* at § 131.10(b). The converse is not true: Downstream states need not lower their standards to accommodate upstream states.

⁷ In this brief, the Appendix to the Petition for Writ of Certiorari will be cited "P.A.", the Joint Appendix cited as "J.A.", and individual exhibits to the administrative proceeding by index number, as listed in the Joint Appendix, e.g., "R., OK-5."

phosphorous and other nutrients. Rejecting the alternative of land application, which would not impact on the quality of any river, Fayetteville decided to build a new treatment plant.

Arkansas' 1981 Water Quality Standards required a dissolved oxygen concentration of only 4.0 milligrams per liter for an effluent dominated river like the White River. That standard would probably be met if all of Fayetteville's effluent from the new plant were discharged to the White River. In 1984 the State of Arkansas proposed upgrading this standard to 6.0 milligrams per liter. That revised standard would be violated if all the effluent from the new plant were discharged to the White River. R., B-10, ¶ NPDES Permit Administrative Record (hereinafter, NPDES Adm. Rec.) 3942-45. Even though the new plant incorporated upgraded technology, Fayetteville's split flow proposal originated in its own recognition that the effluent would contain such quantities of pollutants as to violate water quality standards in the White River.

Fayetteville sought, and eventually obtained, an NPDES permit to ship half of the new plant's total effluent to the Illinois River, up to 6.1 million gallons a day. J.A. 66, 84. The effluent is transported via a series of tributaries and reaches the Illinois River about twenty-two miles upstream from the Oklahoma state line. The River then flows into Oklahoma, crossing the state line at a small lake, Lake Frances—a shallow flow-through reservoir—from which it then flows in a southerly direction to Tenkiller Ferry Reservoir (Lake Tenkiller), below Tahlequah, Oklahoma.⁸ Arkansas' water quality standards for the Illinois River, as recognized by the EPA, "do not contain a prohibition against new or increased point source discharges." R., B-10, 2 NPDES

⁸ Due largely to increasing algae growth since the time of the permit proceedings, Lake Frances' capacity to act as a reservoir of any kind has been virtually eliminated.

Adm. Rec. 482. The River thus provides Fayetteville a conduit whereby it discharges without violating Arkansas' standards.

But although a state designated scenic river, for which EPA had approved standards requiring the highest level of protection, the Illinois River in Oklahoma was degraded, even before EPA permitted the new discharge. P.A. 55a-65a. When Fayetteville sought a construction grant for the new plant, it advised the EPA of the River's already degraded condition:

[T]he stream is not a pristine body of water; nutrient loadings from nonpoint sources and municipal discharges do adversely impact the Illinois River under present conditions, giving rise to high algae productivity and some dissolved oxygen problems.

[L]ake Frances, a shallow flow-through reservoir, is highly eutrophic, as evidenced by extensive growths of macrophytes and filamentous algae. . . . [B]ased on the information so far available, it does not appear to act as an effective nutrient trap. . . . The data suggest that the Lake receives very high loadings of both nitrogen and phosphorous and, further, that these nutrients are flushed through the Lake before complete biological uptake can occur.

Ultimately, the nutrients and the nutrient-stimulated organic matter is washed downstream [from the Illinois River Basin of Arkansas], where it enriches the Illinois River in Oklahoma. This results in deterioration of stream quality in Oklahoma.

201 Facilities Plan Environmental Information Document for the City of Fayetteville (January 1984) (hereinafter, Fayetteville Environmental Information Document), R. Ark.-6, pp. 2-20, 2-22, 2-28. Fayetteville then advised the EPA of the consequences if it obtained permission to discharge into the Illinois River:

The total nutrient loading to Oklahoma would increase, either directly or through scour of enriched sediments.

These changes would be considered *degradation* of water quality and would not be consistent with Oklahoma nutrient standards.

Id. at 4-13, 4-14 (emphasis added).

To Oklahoma, the Illinois is a very special river. Oklahoma has "long recognized the Illinois River as a water course of unique natural beauty." R., B-37, ¶ 16.⁹ In 1970, Oklahoma designated it one of five scenic rivers that "possess[es] . . . unique natural scenic beauty, water conservation, fish, wildlife and outdoor recreational values of present and future benefit to the people of the State." OKLA. STAT. tit. 82, § 1452(a) (1981). Congress has designated the River as a potential Wild and

⁹ In 1952, the Oklahoma Fisheries Research Laboratory described the Illinois River as follows:

Any description of the Illinois River should properly be filled with glowing adjectives . . . for the "Illinois" is a clear, spring-fed stream, flowing through the oak and hickory clad Ozark Hills in a succession of sparkling ripples and along, quiet pools, which inspires cries of "Eureka!" when first viewed . . .

R., B-10, 9 NPDES Adm. Rec. 3,921.

The U.S. Department of Interior in its 1979 study on the Illinois River's potential designation as a national Wild and Scenic River, found:

Picturesque bluffs abut the river over much of its course, affording the user much scenic variety. The pastoral setting of an agricultural valley adds to the recreation enjoyment. Water quality continues to support a diverse fishery, although deteriorated from past years. Characteristic water clarity is one of the stream's most attractive attributes.

U.S. Department of the Interior, Illinois Wild & Scenic River Study (Final Report, 1979), p. 31. As indicated here, the quality had deteriorated from that previously observed, and as recognized by both Fayetteville and Oklahoma, had deteriorated at increasing levels in recent years.

Scenic River under federal law. 16 U.S.C. §§ 1271, 1276 (40) (1988).

As required by the Act, Oklahoma has adopted water quality standards for the scenic Illinois River. Two are particularly relevant here, because they set the highest applicable standards. First, unlike Arkansas, which permits additional discharge loading into the River, Oklahoma has adopted a "beneficial use limitation" which provides:

All streams and bodies designated as (a) [which include state-designated scenic rivers] are protected by prohibition of *any* new point source discharges of wastes, or increased load from an existing point source except under conditions described in Section 3.¹⁰

§ 5, Oklahoma Water Quality Standards (OWQS), J.A. 46-47. (emphasis added)

Second, Oklahoma has extended to the Illinois River the highest of the three tiers of protection under its antidegradation policy:

No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include [rivers] . . . designated "Scenic Rivers."¹¹

¹⁰ Section 3 is Oklahoma's EPA-approved antidegradation policy. J.A. 27. Since no degradation at all is permitted in the quality of a scenic river, no increased load or new discharge from a point source could ever be permitted that degraded such a river. P.A. 47a-48a.

¹¹ The Illinois River is designated a scenic river above the 650 foot elevation level of Tenkiller reservoir to the Arkansas state line. The scenic portion covers virtually the entire stretch of river between Lake Frances and Lake Tenkiller. Hereinafter, "Illinois River" will refer to the portion classified as scenic and protected under the beneficial use limitation and "no degradation" standards.

§ 3, OWQS, J.A. 28. These standards were included in the 1982 standards that EPA approved for Oklahoma under CWA § 303.¹²

EPA issued its NPDES permit to Fayetteville on November 5, 1985, to become effective on December 10, 1985. Oklahoma and Save The Illinois River (S.T.I.R.) promptly requested an evidentiary hearing. The hearing was held August 18-20, 1987. The EPA Administrative Law Judge (ALJ) issued his initial order on January 12, 1988. He held that permits affecting downstream waters would be granted unless there was an "undue impact" on those waters, and that the EPA-approved water quality standards were only "relevant" to the issue of whether a discharge would have such an impact. P.A. 100a-104a. He upheld the permit because in his opinion there would not be an "undue" or "significant" impact on Oklahoma water quality. P.A. 105a.

On appeal, the EPA Chief Judicial Officer (CJO) found that the ALJ committed reversible error by employing an improper legal standard. He found the "plain and straightforward" language of § 301(b)(1)(C) required "unequivocal compliance" with applicable water quality standards and made no exceptions for cost or technological feasibility. P.A. 117a. He remanded for a simple determination of whether there was a detectable violation of the Oklahoma standards:

¹² These standards are of course equally binding upon any discharges from point sources in Oklahoma, and represent Oklahoma's compliance with its duties under the Act to protect all waters within the State. The EPA Administrative Law Judge expressly found that the Oklahoma Water Quality Standards "do not amount to an attempt to establish a separate system for out-of-state sources since they apply equally to Oklahoma sources." P.A. 125a. EPA has never questioned Oklahoma's designation of the Illinois River as an ONRW, and has advised the states that rivers eligible for inclusion as federal Wild and Scenic Rivers, such as the Illinois, should be so designated. E.g., EPA Region I, Guidance for Antidegradation Policy Implementation for High Quality Waters, p. 2 (March 10, 1986).

It would be improper, however, to characterize the required showing as implying the existence of either an "undue impact" or "de minimis" test. The phrase "undue impact" wrongly implies a reasonableness standard, i.e., that violations of water quality standards may be tolerated if justified by the totality of the circumstances. The phrase "de minimis" incorrectly suggests that only "significant" violations are prohibited.

P.A. 118a.

On remand, the ALJ found that the Fayetteville plant would initially discharge thirty pounds a day of nutrients, especially phosphorous, into the Illinois River, increasing to fifty pounds a day as the plant reached design capacity. P.A. 128a. Of this increased pollutant load of eleven thousand to eighteen thousand pounds a year, twenty to twenty-five percent would be bioavailable, i.e., available as a food for algae, in Oklahoma. *Id.* at 129a.¹³ Nevertheless, he refused to void the permit. According to the ALJ, a violation of the beneficial use limitation standard could occur only if the addition of pollutants would "create a nuisance or render the Illinois River in Oklahoma harmful, detrimental [sic] or injurious to any beneficial use of the river." P.A. 126a-127a. He believed that a "mere measurable increase alone" in phosphorous or nitrogen was not enough to show a violation of the nutrients standard, absent a showing that it would cause a change in algae growth or some other parameter. *Id.* at 131a. Finally, he found that dissolved oxygen violations were already occurring, but did not find

¹³ The courts have recognized the intrinsically harmful effects of nutrients such as phosphorous and nitrogen. "[N]itrogen and phosphorous compounds . . . provide food for many species of algae. Excessive nutrient levels degrade water quality both because the proliferation of algae is itself a nuisance and because algae respiration and subsequent death and decay use up oxygen dissolved in the river's waters." *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 575 (D.C. Cir. 1980).

the frequency of these violations would increase "solely" due to the new discharge. P.A. 140a.¹⁴ He failed to discuss the antidegradation standard. The CJO affirmed, finding it was necessary to show a new degradation caused by a change in some water quality parameter such as nutrients. P.A. 152a.

The Tenth Circuit reversed EPA's issuance of the permit to Fayetteville, insofar as the permit authorized a discharge that would reach the Illinois River. The court found that EPA's ruling was defective because it utterly failed to consider an important aspect of the problem, the existing degradation of the River in Oklahoma. EPA's application of Oklahoma's standards to permit additional quantities of pollutants to reach a river already degraded by those same pollutants undermined the Clean Water Act:

If we were to accept this logic, once water quality standards in a stream were violated, additional new discharges might be permitted indefinitely so long as each one would have an unmeasurable individual impact. The absurdity of such a policy is manifest.

Id. at 78a.

Accordingly, the Tenth Circuit ruled that if a river protected by the beneficial use limitation and the highest standard of the antidegradation policy, was already degraded, there was no need to show that a proposed additional discharge would create a new adverse impact, as long as the new discharge included the same pollutants that had contributed to the existing degraded condition. P.A. 79a. In the face of the EPA's finding that up to a fourth of the phosphorous and other nutrients discharged to the Illinois River would be available as algae food in

¹⁴ The ALJ assumed that Oklahoma would be protected by a permit provision requiring modification in light of the findings of an ongoing Arkansas/Oklahoma/EPA study of pollution in the Illinois River. P.A. 143a. Now, more than five years after the permit was issued, the study, although completed, has not been released.

Oklahoma, and the unrefuted evidence (including photographs and Fayetteville's own analysis) that the added discharge would reach an already degraded river, the court concluded that Fayetteville's permit did not insure compliance with Oklahoma's water quality standards, and was therefore unlawful under CWA § 301.

SUMMARY OF THE ARGUMENT

The Clean Water Act's goals are the elimination of the discharge of pollutants, and the restoration of the Nation's waters to their natural state. Congress presumed that any discharge of pollutants, defined broadly to include industrial and municipal waste, was inherently harmful. Accordingly, Congress imposed a nationwide prohibition on the discharge of all pollutants, unless the applicant could prove through a permit process that its discharge would implement state-adopted, EPA-approved water quality standards. It is with respect to the protection of rivers like the Illinois River, outstanding national resource waters, that the statutory mission is most precisely focused, as EPA requires states to adopt standards that, at a minimum, permit *no* degradation of such rivers.

In this permit proceeding, EPA utterly failed to consider an important aspect of the decision as to whether Oklahoma's EPA-approved standards allowed an entirely new point source discharge of waste to enter the Illinois River: that the River was already degraded even before the addition of new waste from Fayetteville. Due to this critical error, EPA provided in this case an interpretation of Oklahoma's standards that allowed a new discharge of harmful waste into the River, even of the same type that had contributed to the existing degradation, as long as the new addition of pollutants did not in itself cause a measurable adverse impact in some other water quality parameter. The Tenth Circuit recognized that this interpretation of the Oklahoma standards

would run counter to the entire purpose of the Clean Water Act, expressed in both the statutory language and legislative history. EPA's interpretation would encourage backsliding, forcing Oklahoma—and the Nation—into a position of retreat within a statutory framework aimed at preserving and improving the Nation's waters.

The Tenth Circuit developed the correct legal standard that EPA should have applied to the Fayetteville permit application. Consistent with the approach that EPA has urged upon federal courts to determine the meaning of water quality standards, the Tenth Circuit examined the text of Oklahoma's standards, found Oklahoma's interpretation of the standards consistent with the language, and then found this interpretation further confirmed by EPA's regulations setting minimum requirements for each state's antidegradation standard, as well as by EPA's application of the standards to prohibit any increased discharge to the Illinois River from a point source located in Oklahoma. Further, EPA had advised the states that the antidegradation standard for outstanding national resource waters specifically prohibited *any* new point source discharge. If anything, the Tenth Circuit narrowed its application of the standards as compared to the meaning previously provided by EPA. While EPA's interpretation would prohibit all new point source discharges of waste to an outstanding national resource water under all circumstances, the Tenth Circuit applied the standard to the limited situation where the waters were previously degraded, and the additional pollutants were of the same type that had contributed to its degraded condition. In the face of unrefuted evidence of the Illinois River's degraded condition, and the agency's finding that up to one fourth of the phosphorous discharged into the River would be available as algae food in Oklahoma, the Tenth Circuit correctly found the permit did not insure compliance with Oklahoma's EPA-approved standards, and was therefore unlawful under the Clean Water Act.

ARGUMENT

I. EPA FAILED TO CONSIDER THE CURRENTLY DEGRADED STATUS OF THE ILLINOIS RIVER IN ITS APPLICATION OF THE OKLAHOMA STANDARDS TO THE FAYETTEVILLE NPDES PROCEEDING, AND AS A RESULT OF THIS FAILURE, EPA ADOPTED AN UNREASONABLE INTERPRETATION THAT WAS PROPERLY SET ASIDE BY THE TENTH CIRCUIT.

EPA's interpretation of the Oklahoma standards at issue here is analogous to forcing a child who is vulnerable to infection from a particular bacteria, and has been and is currently infected by that bacteria, to absorb additional quantities of that bacteria until such time as his temperature increases or he becomes "measurably" more sick in some way. Addressing only whether the new pollutants would result in a new harmful impact in some water quality parameter, the EPA totally ignored the unrefuted evidence that the Illinois River was already degraded, and that the additional pollutants from Fayetteville were of the same type that contributed to its degraded condition in the first place. EPA's interpretation of Oklahoma's EPA-approved standards was unreasonable as a matter of law, because it fundamentally violated the statutory objectives of the Clean Water Act—restoring and improving the quality of our waters—as well as the role intended for the antidegradation policy in achieving those goals.

A. The Clean Water Act Requires Compliance With Federally-Approved Water Quality Standards of Downstream States.

In adopting the Clean Water Act, Congress set forth in clear terms its purpose to achieve the complete elimination of the discharge of pollutants into the navigable waters. The sponsors succeeded in including this goal, despite strong objections. See *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 179-81 (D.C. Cir. 1982). Even

the statutory language setting forth the goal of restoring the Nation's waters to their chemical, physical, and biological integrity was harshly attacked by critics, who urged that the natural state of our waters should not be pursued as a goal for its own sake, but rather that the aim of the statute should focus narrowly on the achievement of beneficial uses where economically feasible. Letter from W. Ruckelshaus, December 31, 1971, reprinted in 1 1972 LEGIS. HIST. 834, 835. Still, the sponsors prevailed and Congress enacted a comprehensive program for the "elimination of water pollution." *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (emphasis added).

In the case of permit applicants whose discharges would reach other states, both Congress and EPA have recognized that the Act's objectives would be frustrated if dischargers were permitted to export their pollution across state lines and violate the water quality standards of downstream states. The critical substantive provision of the Clean Water Act, relevant here, is § 301(b)(1)(C), which states:

[T]here shall be achieved—

any more stringent limitation . . . required to implement any applicable water quality standard established pursuant to this chapter. (emphasis added).

This substantive provision requires compliance with EPA-approved standards of source *and* downstream states. So important is it that this substantive provision be given effect, Congress and EPA have also provided additional procedural safeguards to insure compliance with EPA-approved water quality standards of downstream states. When EPA is the permitting authority, as was the case here, the statute requires the source state to certify that the discharge will comply with all applicable state water quality standards approved by EPA. CWA § 401(a)(1). Even if a state provides certifica-

tion, the EPA must notify a downstream state, whose water quality may be affected, and, if the downstream state requires, a hearing is held after which the EPA “*shall* condition . . . [the] permit in such manner as may be necessary to *insure compliance* with applicable water quality requirements. If the imposition of conditions cannot *insure* such compliance, [the EPA] *shall* not issue such license or permit.” CWA § 401(a)(2) (emphasis added). EPA has also adopted implementing regulations prohibiting the issuance of any NPDES permit where conditions cannot *insure* compliance with applicable water quality requirements *of all affected states*. 40 C.F.R. § 122.4(d).¹⁵

Arkansas’ argument, that the only role for the downstream states is to consult with the permitting authority, ignores the statutory structure, as well as the indicators of statutory meaning contained in EPA’s implementing regulations. These implementing regulations are entitled to weight under *Chevron, United States, Inc. v. Natural*

¹⁵ Similarly, states which have NPDES permitting authority must insure compliance with federally-approved water quality standards of downstream states. The Act prohibits approval of a state permit program unless the state can assure compliance with all applicable standards including those under CWA §§ 301(b)(1)(C). CWA § 402(b)(1)(A). States the water quality of which may be impacted must be given notice and an opportunity for input, and if their proposals are not accepted by the source state, the EPA must be notified of the reasons. CWA § 402(b)(3), (5). Finally, even if a state decides to issue a permit, EPA may veto the permit and assume permitting authority if the state permit fails to assure compliance with applicable downstream standards, and thus falls outside the “guidelines and requirements” of the Act. CWA § 402(d)(2)(B). See *Champion Int'l Co. v. EPA*, 648 F.Supp. 1390 (W.D.N.C. 1986), vacated on other grounds, 850 F.2d 182 (4th Cir. 1988) (EPA objected to permit because it did not *unequivocally insure* compliance with narrative water quality standards of affected downstream state.). The regulation prohibiting NPDES permits, where conditions cannot assure compliance with applicable water quality standards of all affected states, also applies where states have permitting authority. 40 C.F.R. § 123.25(1), (15).

Resources Defense Council, Inc., 467 U.S. 837, 843-44, *reh'g denied*, 468 U.S. 1227 (1984).¹⁶ As the Tenth Circuit recognized, Arkansas’ interpretation would permit interstate water quality to be set at the lowest common denominator anytime the upstream source state had lower water quality standards than those deemed desirable by the downstream state, contrary to the purposes of the Act. P.A. 13a.¹⁷ In fact, in this proceeding, water qual-

¹⁶ Arkansas also relies on this Court’s “undue impact” dicta in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), to support its argument. That case, however, dealt with a different issue: whether the Act preempts a nuisance suit brought against an out-of-state discharger under the nuisance laws of the downstream state. In holding that such common law nuisance suits were preempted by the Act, the Court found that plaintiffs in that case were attempting to set up a “second permit” system, which would disrupt the NPDES permit system established by the Act. *Id.* at 491. Oklahoma does not seek to circumvent the NPDES permit process, but to protect itself through it. The requirement that downstream states’ EPA-approved water quality standards be enforced in the unitary NPDES permit process is entirely consistent with *Ouellette*.

Ouellette was decided January, 1987. In subsequent NPDES permit cases involving interstate waters, EPA adopted the position that *Ouellette* did not apply. See Joint Brief of EPA and State of Tennessee, pp. 48-50, *Champion Int'l Corp. v. EPA*, No. 87-3529 (4th Cir. 1988) (*Ouellette* “has no application to cases brought under the Clean Water Act,” and North Carolina, the upstream state “continues to be required to assure compliance with Tennessee’s Section 303 water quality standards.”). In this proceeding, the EPA Chief Judicial Officer held the *Ouellette* “undue impact” dicta inapplicable, because it conflicted with the clear language of § 301 (b)(1)(C). P.A. 118-119a. Before this Court, however, the government apparently seeks to resurrect *Ouellette* to argue that the Clean Water Act confers broad powers to the EPA to impose a *de minimis* standard on water quality violations, EPA Brief, pp. 17-18, 28-29, a position that finds no explicit support in the language of the Clean Water Act or its implementing regulations, and that was explicitly rejected by the EPA below. P.A. 118a.

¹⁷ Water quality standards originated in the Water Quality Act of 1965. In that statute Congress required each state to promulgate standards for the “interstate waters or portions thereof within such state.” See 33 U.S.C. § 1160(c)(1)(1970). Congress thereby

ity would be set at the lowest common denominator if Fayetteville did not have to comply with Oklahoma's federally-approved standards. Arkansas has not imposed a "no discharge" prohibition on the Illinois River in Arkansas. R., B-10, 2 NPDES Adm. Rec. 482. Arkansas has not designated the Illinois River as a scenic river or its equivalent, nor has the Arkansas segment been included as a potential national Wild and Scenic River. *Id.* at 3,941. And, while Arkansas has an antidegradation policy for the River, it provides only protection for existing uses:

No point source discharge shall be permitted without taking into account the highest instream use of the existing stream and the need to protect existing uses of downstream waters.

Id. at 3,941.¹⁸ The discharge of additional pollutants from Fayetteville would be permissible under the Arkansas standards as long as it did not threaten any "existing uses," even though it would violate Oklahoma's standards as soon as the state line was crossed, as Oklahoma's EPA-approved standards prohibit any degradation, regardless of whether an existing use is threatened.¹⁹

recognized the particular need to protect water quality in the interstate context, where a downstream state's water quality would be impacted by an upstream discharge. A lowering of the quality of such waters to the lowest common standard was not to be tolerated:

The Committee must reemphasize its intent that water quality standards are not designed to "lock in" present uses of water or to exclude others, not now possible. The standards are not a device to insure the lowest common denominator of water quality but to enhance the quality and productivity of our water resources. S. Rep. No. 10, 89th Cong., 1st Sess., p. 10, *reprinted in SEN. RPTS., MISC. RPTS. ON PUBLIC BILLS*, Vol. 1-1 (1965).

¹⁸ See 40 C.F.R. § 131.10, which requires states to adopt standards which *insure the attainment* of the water quality standards of downstream states (not just their existing uses).

¹⁹ There is no basis for Arkansas' apparent suggestion that § 303(d) of the Clean Water Act implicitly limits the role of EPA-approved state water quality standards to prevent further pollution

B. While EPA Recognized That A Discharger Must Comply With EPA-Approved Water Quality Standards of Downstream States to Carry Out The Purposes of the Clean Water Act, In This Case EPA Provided An Unreasonable Interpretation of the Oklahoma Standards That Undermined the Act's Objectives.

Under *Chevron*, a reviewing court must set aside an agency interpretation of a legal standard if it is arbitrary, capricious or manifestly contrary to the statute in view of its language or legislative history. *Chevron*, 467 U.S. at 844. The deference due an agency depends on how much discretion Congress intended the agency to have in resolving the particular type of decision before it. *E.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-12 (1971). In *Chevron*, for example, a case arising under the Clean Air Act, Congress had recognized, but had been unable to reconcile, two "manifestly competing" interests, the economic interest in business development and the environmental interest in improving air quality. The Court recognized that Congress' silence afforded the agency broad discretion to forge an "effective reconciliation of these twofold ends . . .". *Chevron*, 467 U.S. at 866, *citing United States v. Shimer*, 367 U.S. 374, 383 (1961).

Here, Congress has clearly spoken. Congress has evaluated the competing interests that arise in interstate water quality disputes, and has determined that when a discharger impacts upon the water quality of a downstream state, the permit must be prohibited unless compliance is *insured* with federally-approved water quality standards. As both EPA and the Tenth Circuit recognized, Con-

of already degraded waters. While § 303(d) requires states to identify waters where water quality standards are not being achieved through technology-based limitations imposed on existing dischargers, the statute does not in any way purport to limit the application of any more stringent state water quality standard, which, once approved by EPA, must be enforced in individual permit proceedings.

gress has not authorized the permitting agencies to balance the affected interests or to impose a reasonableness test. *See Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977) (Clean Water Act is a "tough law that reli[e]s on explicit mandates to a degree uncommon in legislation of this type."). The "thorough, probing, [and] in-depth review" required of agency action, *Overton Park*, 401 U.S. at 415, must focus on the issue of whether EPA fully considered all relevant information to determine whether Fayetteville should receive its permit, in view of the Act's objectives and the key role which the NPDES permit process plays in achieving those objectives.

EPA failed to consider an important aspect of its permit decision when it ignored the previously degraded condition of the Illinois River in Oklahoma. In a statutory framework aimed at the restoration of waters to their natural state, Congress has required that "pressure must be maintained to assure improved quality and to avoid slipping back." S. Rep. No. 370, 95th Cong., 1st Sess. (1977), reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4326, 4367. The interpretation afforded by EPA in this proceeding would permit additions of harmful pollutants to reach the Illinois River, already degraded by those pollutants, as long as each addition was sufficiently "incremental" so as not to result in a discrete harmful impact on some measure of water quality. And, of course, as the total number of pollutants already present in a river increases, each new incremental addition of pollutants is less likely to have a demonstrable impact. Compare Prefiled Testimony of M. Schornick, R. OK-2, at 4 (Phosphorous loading to Lake Frances had increased 106% over 1974-1975 levels), with ALJ Decision on Remand, P.A. 129a (Fayetteville effluent would only increase phosphorous loading to Lake Frances by an additional 2.4%). Thus, under EPA's interpretation, the more polluted a river, the less likely a new discharge would be prohibited, because its discrete harmful effect would be less likely to be measured. This would exacer-

bate pollution, contrary to the intent of the Act and the regulatory framework.²⁰

Fayetteville's discharge contained at least two pollutants, phosphorous and nitrogen, that were already adversely impacting the water quality of the Illinois River. P.A. 80a. Congress could not reasonably have intended the permitting authority to exclude from consideration the existing degraded condition of a scenic river, for which EPA has approved the highest protective standards, where additional pollutants would reach the river of the same kind that contributed to its degraded condition.²¹

²⁰ Carried to its logical extreme, EPA's interpretation would place upon the permitting authority the almost impossible task of identifying in all circumstances precisely which point source put the river in a degraded condition, since, once it was degraded, additional point sources could be permitted indefinitely as long as the discharges were sufficiently incremental to avoid a discretely identifiable harmful impact. Such an interpretation would clearly frustrate the Act's objectives, particularly in regard to protection of outstanding national resource waters. Moreover, Congress recognized that there might be numerous factors contributing to the degraded condition of a body of water (including nonpoint sources), but Congress "[did] not consider this to be an acceptable excuse for point sources not meeting their individual requirements." H.R. Rep. No. 911, 92nd Cong., 2d Sess., reprinted in 1 1972 LEGIS. HIST. 753, 789.

²¹ As recognized by the Tenth Circuit, EPA's hearing officer failed to consider another important aspect of the case, "the oxygen reducing effect of algae respiration and decay," and showed an incomplete understanding of phosphorous assimilation. P.A. 74a. The court quoted the ALJ's statements that "assimilative processes [at low flows] is at its [sic] most effective stage, and therefore removes more nutrients upon which the algae feed. . ." and that "additional assimilation of phosphorous takes place [below Lake Frances] . ." P.A. 68 n. 47, quoting Order on Remand, P.A. 129a, 131a.

The Tenth Circuit noted that the "glaring error" of the ALJ's statement was that uptake of nutrients by algae was itself an "assimilative" process that did not reduce the potential for eutrophication, but was an additional step in the process. P.A. 68a n. 47. The Court concluded:

These are grave misunderstandings because the phenomena of oxygen depletion, which results from "over-fertilization" of a

C. EPA's Interpretation Of The Oklahoma Standards Was Unreasonable Because The Clean Water Act Does Not Require A Showing Of Harm For A Discharge To Be Prohibited And EPA Failed To Provide Any Explanation As To Why In This Case Such A Showing Would Be Required.

EPA's application of the Oklahoma standards runs counter to the Clean Water Act's statutory and regulatory framework, which does not require that a discharge be proven harmful to fall within the Act's prohibitions. Rather, the Act presumes that the discharge of pollutants is inherently harmful, and thus prohibits all discharges unless compliance is assured with water quality standards through a permit process. In the statute, "pollution" means the "man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." CWA § 502(19). Pollutant is defined to include "industrial, municipal, and agricultural waste discharged into water . . .". CWA § 502(6). None of these terms has been defined in terms of harm to the environment, and substances are subject to the Act's prohibitions if they result in "man-made or man-induced alteration" of water, even where there is no knowledge that the substance is harmful, or where its effects are subject to uncertainty. *FMC Corp. v. Train*, 539 F.2d 973, 983 (4th Cir. 1976); *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 218 n. 151 (5th Cir. 1989), cert. denied, — U.S. —, 110 S. Ct. 1936 (1990);²² cf. *Hudson River Fishermen's*

stream and the consequent increase in organic matter, and phosphorus uptake by aquatic organisms, are intrinsic to the eutrophication process.

Id. at 69a n. 47.

²² The legislative history confirms Congress' conviction that the discharge of all pollutants was to be viewed as inherently harmful. In formulating the definition of "pollutant", Congress deliberately incorporated the applicable definition from the Refuse Act of 1899, S. Rep. No. 414, 92nd Cong., 2d Sess. (1972), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3668, 3742. The Refuse Act prohibited the discharge of "any refuse matter of any kind or description what-

Ass'n v. City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1990) (substance discharged into navigable water is a "pollutant" even when intended use is beneficial).

Consistent with its statutory goals, the Clean Water Act does not require a showing that a new discharge creates an incremental new harm in order to constitute a violation of the Act. See, e.g., *C. & H Sugar Co. v. EPA*, 553 F.2d 280, 289 (2d Cir. 1977) (effluent limitations, enforced in permit process, required removal of a "minute" quantity of a pollutant, even where there was no showing aquatic life was threatened); *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1491 (9th Cir. 1987), vacated, 485 U.S. 931 (1988) (Clean Water Act makes no provision for "aggregative" standard or "rare" violations); *Student Pub. Interest Group v. P.D. Oil & Chem.*, 627 F. Supp. 1074, 1082 (D.N.J. 1986) ("[P]laintiffs are not required to show that a particular percentage of the pollution that affects their interests is traceable to defendant's effluent . . . [as] numerous polluters contribute to an environmental harm like pollution of rivers.")

In the face of the statute's presumption that the discharge of any pollutant is inherently harmful, EPA failed to provide any explanation of how it could construe Oklahoma's standards to permit the discharge of additional pollutants, *known to be harmful*, to waters that were, in fact, already harmed by those types of pollutants. EPA's error is even more pronounced in view of the information provided by EPA to the states about the pollutant phosphorous:

sover other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water." 33 U.S.C. § 407 (1970). Congress recognized the value of a strong prohibition of all discharges: "The Committee believes it is important to clarify this point: No one has the right to pollute." S. Rep. No. 414, 92nd Cong., 2d Sess. (1972), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3668, 3709, cited in *United States v. Hamel*, 551 F.2d 107, 110-11 (6th Cir. 1977).

Generally, it is recognized that phosphorus is not the sole cause of eutrophication but there is substantiating evidence that frequently it is the *key element* of all of the elements required by freshwater plants, and generally, *it is present in the least amount relative to need*. Therefore, an increase in phosphorus allows use of other already present nutrients for plant growth.

Once nutrients are combined within the aquatic ecosystem, their removal is tedious and expensive. *Phosphates are used by algae and higher aquatic plants and may be stored in excess of use within the plant cell.* With decomposition of the plant cell, some phosphorus may be released immediately through bacterial action for recycling within the biotic community, while the remainder may be deposited with sediments.

EPA Quality Criteria for Water (1986), Phosphorus (emphasis added). That phosphorous may be "stored in excess of use" in itself raises a serious doubt as to whether the agency considered all relevant factors in its interpretation of Oklahoma's standards. As recognized by the EPA here, the observable harm caused by increased loading may not occur immediately, but may occur after the algae cells die and the previously stored phosphorous is recirculated throughout the aquatic system. Further, EPA had found that phosphorous availability was the controlling factor for algae growth in the Illinois River System, P.A. 131a, yet EPA failed to consider this factor in its interpretation of the applicable Oklahoma standards.

D. EPA's Interpretation Ignored The Importance Of The Antidegradation Standard For An Outstanding National Resource Water.

EPA's interpretation was also fundamentally flawed because it failed to consider the critical importance of Oklahoma's EPA-approved antidegradation standard applicable to the Illinois River. The ALJ failed to give any

independent significance to this standard in his Order on Remand.

The federal antidegradation policy dates back to 1968, when the Secretary of the Interior required states to adopt, as part of their water quality standards, a provision that "water whose existing quality is better than the established standards . . . will be maintained at their existing high quality." Compendium of Department of Interior Statements on Non-Degradation of Interstate Waters (Aug. 1968). In 1975, EPA adopted regulations, requiring states, *at a minimum*, to provide a three-tier policy, under which *no degradation* would be allowed of high quality waters which constitute an outstanding national resource. 40 Fed. Reg. 55,334, 55,336 (1975). EPA has advised the states that the purpose of the antidegradation standard is to maintain water quality "and prevent backsliding." Questions and Answers on Water Quality Standards, July 12, 1979, reprinted in ENV'T Rptr. (BNA) 31:5152. And in 1983, EPA rejected a proposed rule that would have weakened the mandatory antidegradation policy by imposing a cost-benefit test and by limiting the policy's protection to existing uses, even for outstanding national resource waters. In response to sharp criticism, EPA retained the existing policy and reaffirmed the special protection afforded outstanding national resource waters:

Finally, § 131.23(a)(3) [the predecessor to 40 C.F.R. § 131.12(a)(3)] provides special protection of waters for which the ordinary use classifications and water quality criteria do not suffice, denoted "outstanding National resource water." Ordinarily most people view this subsection as protecting and maintaining the highest quality waters of the United States: that is clearly the thrust of the provision. It does, however, also offer special protection for waters of "ecological significance."

48 Fed. Reg. 51,399, 51,403 (1983).

Congress has been particularly concerned about the dangers of falling back, or backsliding, from progress made toward the realization of the Act's objectives, and has focused on the antidegradation policy as key to protecting those gains. In 1987, Congress enacted an anti-backsliding amendment which provided that where a state had achieved water quality in excess of that needed to protect designated uses, adjustments could be made to waste load allocations *only* if the revision was consistent with the state's approved antidegradation policy. CWA § 303(d)(4)(B). Describing the antidegradation policy as a "cornerstone" of the entire statute, Congress stated:

The principal objective of the Act is the restoration and maintenance of the integrity of our Nation's waters. *Every requirement of the statute looks toward cleaner water—never backward toward relinquishing pollution control gains that contribute to meeting that objective.* . . . Attainment and maintenance of clean water will not be achieved if it is permitted to be degraded without compelling and overriding reasons. Moreover, if the Act is to accomplish its objectives, *the high quality of waters considered to be outstanding national resources must be preserved.*

S. Rep. No. 50, 99th Cong., 1st Sess. (1985), reprinted in 2 Sen. Comm. on Public Works, 100th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, 1425-1426 (1988). (emphasis added).

Without the highest antidegradation requirement for rivers protected as outstanding national resource waters, pollution would be permissible until its cumulative effect reduced the quality of a given body of water below the standards that must be enforced under the Act. In this case, EPA adopted an interpretation that permits backsliding, as additional quantities of known pollutants would be allowed, indefinitely, into a previously degraded river until the cumulative impact were such as to con-

tribute to another incremental quantum of measurable degradation. Such an aggregative approach to the standard would directly undermine the purpose of the standard, to insure that every step is a step forward.²³

II. THE TENTH CIRCUIT FORMULATED THE CORRECT STANDARD TO DETERMINE WHETHER FAYETTEVILLE'S PERMIT TO DISCHARGE INTO THE ILLINOIS RIVER WOULD COMPLY WITH OKLAHOMA'S WATER QUALITY STANDARDS.

The Tenth Circuit applied a correct standard to determine whether the Fayetteville discharge insured compliance with Oklahoma's standards. The Court found that

²³ EPA has apparently failed to recognize in this proceeding that the applicable Oklahoma standards insure protection of water quality above that necessary to preserve any designated use. In its early comments on Fayetteville's proposal, EPA acknowledged that the standards prohibited any new point source discharge to the Illinois River, but, apparently failing to grasp the significance, concluded "there would not be an adverse impact on designated uses in either state." 2 NPDES Adm. Rec. 482, R. B-10. At the hearing, Fayetteville witness Thompson acknowledged that the increased phosphorous load to the Illinois River would violate Oklahoma's beneficial use limitation standard, even if no designated use were threatened. R. C-1, pp. 245-247, P.A. 65a. And Fayetteville's Environmental Information Document acknowledged that the discharge would further degrade the River. R. Ark.-6, p. 4-14. Nevertheless, when formulating his legal standard, the ALJ required Oklahoma to show that the discharge would "create a nuisance" or render the River "harmful, detrimental [sic], or injurious to any beneficial use. . ." P.A. 126a-127a.

The commentators have cautioned against an approach which links the protection of the antidegradation policy with impact on existing uses: "A use oriented policy . . . could produce significant degradation of waters . . . EPA additionally would have to base a use-oriented policy on the rather questionable science that attempts to determine the levels of pollution that are acceptable to an aquatic ecosystem. Scientific knowledge, while appropriate to mandate existing restrictions, is too uncertain to warrant relaxation of requirements because the water is 'clean enough'." Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND L. REV. 1167, 1192-93 (1983).

for rivers protected by Oklahoma's beneficial use limitation and antidegradation standard prohibiting any degradation, there must be a detectable change in water quality for that water to qualify as degraded. But once the quality of the receiving stream was degraded, it was not necessary to prove that the incremental impact of a proposed additional discharge must itself be detectable. "Rather, if a body of water is experiencing [water quality standards] violations and a proposed new source would discharge the same pollutants to which those standards apply, that source may not be permitted if its effluent [would] reach the degraded waters." P.A. 79a-80a. The legal standard formulated by the Tenth Circuit did not originate in its own interpretation of what the standard should be. Rather, applying a test urged on the courts by EPA in previous cases, the court examined (1) Oklahoma's interpretation of the standards in light of their plain meaning; (2) EPA's previous interpretations of the standards as applied to other dischargers on the Illinois River; and (3) EPA's regulations describing the minimum requirements for each state's antidegradation policy. These sources were consistent with each other and confirmed Oklahoma's interpretation that the discharge would violate its EPA-approved standards. This interpretation is clearly confirmed by EPA's instructions to the states on how to implement the antidegradation policy for outstanding national resource waters, and also clearly confirmed by EPA's internal legal analysis of the meaning of the standard. EPA's assertion that the interpretation of Oklahoma's water quality standards, proffered by a hearing officer in 1987, "presumably" reflects the interpretation that EPA would have been provided five years previously when approval was granted, EPA Br. pp. 19-20, ignores the *actual* interpretations of those standards that had been previously provided by EPA.

In other cases, EPA has suggested the proper analytical framework to determine the meaning of a water

quality standard. In *Champion*, EPA found that a permit sought by a North Carolina facility to discharge into the Pigeon River, about twenty-six miles upstream from the Tennessee border, would violate Tennessee's EPA-approved color standard for the river. The Tennessee standard was a narrative standard. EPA looked to Tennessee's interpretation of its standard, and advised the District Court:

As the party best able to interpret and apply its own standards, Tennessee's views of what permit conditions are necessary to meet Tennessee law deserve deference from North Carolina, EPA and this court. Tennessee's legal analysis is entitled to substantial deference, and its factual determinations concerning the permit limits necessary to meet its standards should be accepted unless arbitrary and capricious.
Udall v. Tallman, 380 U.S. 1 (1965).

Motion of EPA for Summary Judgment, *Champion International, Inc. v. EPA*, Civ. No. A-C-86-26 (W.D. N.C.), filed October 16, 1986, p. 51 n. 22. (emphasis added). Since Tennessee's interpretation of its standard was consistent with EPA regulations and guidelines, EPA urged the Court to accept it. *Id.* at 51-52.²⁴

A. Oklahoma Has Interpreted Its Standards In This Proceeding To Prohibit Any Addition of Pollutants to the Illinois River.

Oklahoma's beneficial use limitation standard was included in the first water quality standards adopted after the passage of the 1972 amendments to the Clean Water

²⁴ In *Navistar Int'l Transp. Corp. v. EPA*, 858 F.2d 282, 287-88 (6th Cir. 1988), cert. denied, 490 U.S. 1039 (1989), EPA faced the similar question of interpreting the meaning of a state air quality standard enforceable under the federal Clean Air Act. Consistent with EPA's approach in *Champion*, the agency examined the testimony of the state government official who drafted the state standard, and found his views consistent with both the standard's plain language and the statute's goal of reducing pollution.

Act, and has been included in every triennial revision of those standards since then.²⁵ Statement of L. Edmison, Addendum to R., B-83. The limitation was applied to new or additional point source discharges that reached the Illinois River, whether originating on the River or on a tributary that flowed into the protected part of the River. In 1982, Oklahoma's Pollution Control Coordinating Board advised Fayetteville that the Illinois River was degraded, and that the new proposed discharge would constitute a violation of the beneficial use limitation standard approved for the River. R. B-10, 7 NPDES Adm. Rec. 2,969. Oklahoma consistently has interpreted the beneficial use limitation standard to prohibit the Fayetteville discharge.

Oklahoma's antidegradation policy has also been included in every submission of water quality standards to the EPA, and prohibits any degradation of outstanding national resource waters, including state-designated scenic rivers such as the Illinois River.²⁶ Oklahoma advised EPA on August 7, 1985, of reports that the water quality on the River had been degrading at an "alarming rate" over the past decade, and that Fayetteville's own assessment of the impact of its discharge on the River showed that

²⁵ The 1973 language provided that "a" streams were protected from "any future discharge of pollutants." Because this language could be interpreted to ban even existing discharges, the language was modified in 1976 to accomplish the intent of prohibiting "a new point source discharge of wastes or increased load from an existing point source." Addendum to R., B-83.

²⁶ Until 1976, Oklahoma's antidegradation standard required maintenance of the high quality of waters where quality exceeded that necessary to preserve designated uses, unless limited degradation were demonstrated to be necessary for economic development. Oklahoma has never permitted any point source degradation of the Illinois River on these grounds. In 1976, the language was changed to the current form, permitting *no degradation* of high quality outstanding resource waters.

the "resulting changes would be considered degradation and would not be consistent with the Oklahoma nutrients standards." R., B-10, 2 NPDES Adm. Rec. 692 (emphasis added). When Oklahoma requested its evidentiary hearing on December 10, 1985, it again advised EPA that any discharge that reached the Illinois River would violate the antidegradation standard. R., B-2. On September 15, 1986, EPA approved Oklahoma's 1985 water quality standards, containing the same antidegradation standard for the Illinois River that had been included in the 1982 standards. Although Oklahoma had advised EPA that it interpreted its antidegradation standard to prohibit the Fayetteville discharge, EPA did not question that interpretation when it approved the standards in 1986. R., EPA-6. The Tenth Circuit found Oklahoma's interpretation of its standards further confirmed by their plain meaning. P.A. 47a-48a.¹ The 1982 beneficial use limitation standard for scenic rivers prohibits "any new point source discharge of waste[s] . . . except under conditions described in Section 3." J.A. 46. Section 3, the Oklahoma Antidegradation Policy, provides "[n]o degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance [including scenic rivers]." J.A. 28.²⁷

²⁷ The EPA's error would not have been cured had the 1985 water quality standards been applicable. The 1985 standards prohibited any new or increased point source discharge which "increase[d] pollutant loading." OWQS § 7.11 (1985). Although pollutant loading is not a defined term, "pollution" is defined in the Oklahoma standards to include "contamination or other alteration of the physical, chemical, or biological properties of any natural waters of the State. . ." Under the Oklahoma standards, as under the Clean Water Act, there is no required showing that a substance be harmful to fall within these statutory definitions, as long as its discharge results in a "man-induced alteration of the receiving stream." *FMC Corp. v. Train*, 539 F.2d 973, 983 (4th Cir. 1976).

B. Oklahoma's Interpretation Was Confirmed By EPA's Application of the Standards To An Oklahoma-based Discharger To The Illinois River.

As the Tenth Circuit recognized, Oklahoma's interpretation of its beneficial use standard was consistent with an earlier interpretation of that same standard by EPA as applied to the Tahlequah, Oklahoma waste water treatment plant. P.A. 51a n. 37. The record contains a letter from Lawrence R. Edmison, Director of the Oklahoma Department of Pollution Control, to EPA, confirming a conversation regarding possible revisions to Oklahoma's Waste Water Quality Management Plan for Tahlequah: "Based on *our understanding* that Tahlequah's discharge *must not increase* loading on the Illinois River which does carry the "a" designation, we hereby submit further revisions to Tahlequah's proposed effluent limits." Addendum to R., OK-4 (emphasis added). An earlier memorandum to Mr. Edmison from Quang Pham, of the Oklahoma State Department of Health, stated that since the time Tahlequah had first sought permission to increase its load, it had been determined that Tahlequah Creek, the receiving stream for the discharge, was a tributary of the Upper Illinois River above the six hundred and fifty foot elevation. Because this portion of the River was protected by Oklahoma's "a" designation, "*EPA indicated that no load increase would be allowed for Tahlequah.*" *Id.* (emphasis added).²⁸

The interpretation of this standard sought by Oklahoma for the Fayetteville discharge is identical to the interpretation EPA had given to that same standard as applied to Tahlequah in 1986.

²⁸ The issue of how the beneficial use "a" designation applied to Tahlequah originated in uncertainty as to whether the receiving stream from that discharge flowed into a portion of the Illinois River above the six hundred fifty foot elevation. When a survey showed that the tributary was above the 650 foot elevation, both Oklahoma and EPA agreed that the beneficial use limitation prohibited any increased discharge of waste from Tahlequah. Addendum to R., B-83.

C. Oklahoma's Interpretation Of Its Antidegradation Standard Is Consistent With the Interpretation That EPA Has Provided For That Standard.

In recognition of the key role of the antidegradation policy in preserving outstanding national resource waters, EPA has adopted regulations that at "a minimum" require each state to "maintain and preserve" such waters. 40 C.F.R. § 131.12(a)(3). The Tenth Circuit found the plain language interpretation of the Oklahoma standards, to allow "no degradation" of scenic river water quality through the introduction of additional pollutants, to be consistent with these minimum guidelines. P.A. 48a n. 34.

That the antidegradation standard prohibits new discharges to the Illinois River is further confirmed by the instructions that EPA has given to the states—in question and answer format—on how to implement the policy. These instructions included the following:

In High Quality Waters, Are New Dischargers Or Expansion of Existing Facilities Subject to the Provisions of Antidegradation?

Yes. Since such activities would presumably lower water quality, they would not be permissible unless the State finds that it is necessary to accommodate important economic or social development.

EPA, Questions and Answers on Antidegradation (Aug. 1985), p. 6. Since Oklahoma classifies the Illinois River as an outstanding resource water, no additional discharges would be allowed under EPA's guidelines, even to accommodate economic or social development. 40 C.F.R. § 131.12(a)(3). EPA's 1985 instructions were consistent with earlier guidelines in which EPA advised the states of techniques available to implement the policy, including "[r]estricting any new discharge of pollutants from new and existing sources." Chapter 5 Water Quality Standards, 41 Fed. Reg. 47,777 (1976) reprinted in ENVT RPTR. (BNA) 31:5121, 5126 (May 11, 1979) (emphasis added). Such implementing regulations are

indications of the meaning to be given to the standards. *E.I. DuPont DeNemours & Co. v. Train*, 430 U.S. 112, 135 n.25 (1977).

These instructions to the states also reflect EPA's internal understanding of the application of the antidegradation standard to outstanding national resource waters. In 1979, the Director of the EPA's Water Criteria and Standards Division asked the EPA General Counsel's office whether, in the event states failed to promulgate standards to protect an ONRW, EPA had the legal authority to promulgate such a standard. The response of the agency's counsel is highly instructive:

Assuming a State has adopted an ONRW, you ask if EPA has authority to promulgate a water quality standard to protect the ONRW's status. We are not sure why *any* water quality standard would be necessary for an ONRW, since the standard is *no* degradation; it would seem that arguments over *x* or *y* micrograms per cubic meter would be irrelevant. Whenever a new point source applied for a permit to discharge into an ONRW, we could simply deny the permit (or force the State to deny the permit through our veto power) under § 301(b)(1)(C), which requires compliance with all State laws.

EPA, Memorandum from J. Rogers, Associate General Counsel, Water and Solid Waste Division to K. Mackenthun, Director, Criteria and Standards Division (August 15, 1979), p. 4 (emphasis in original). The legal memorandum drew a distinction between the Clean Air Act, which prohibited only "significant" deterioration, and the Clean Water Act, where *no* degradation meant no new point source discharges of pollutants.²⁹ As an agency

²⁹ The same memorandum confirmed that the States, not EPA, had responsibility to designate outstanding national resource waters, an interpretation that has been recently affirmed. Memorandum from C. Winer, Attorney, Water Division, to W. Diamond, Director, Criteria and Standards Division (May 8, 1989).

interpretation from EPA's national legal office, this memorandum is entitled to persuasive weight in determining the meaning of the standard. *Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979).

In this proceeding, Oklahoma did not reach an interpretation of the antidegradation standard that was inconsistent with EPA's past interpretations of that standard. Its interpretation was clearly consistent with EPA's instructions to the states, its internal legal analysis of the meaning of the standard, and its regulations establishing the *minimum* requirements of preservation and maintenance of outstanding national resource waters. In this particular permit proceeding, it is EPA that has applied an interpretation at odds, not only with the statute's purposes, but with its own past authoritative guidelines, and thus EPA's interpretation should not be accorded weight in this case. *E.g., United States v. Larionoff*, 431 U.S. 864, 872 (1977) (no deference to administrative interpretation if it is "plainly erroneous or inconsistent with the regulation.").

D. Oklahoma's Interpretation Is Consistent With The Interpretation Provided By the Arkansas-Oklahoma Arkansas River Compact Commission.

Congress recognized that pollution disputes could arise between the States. The Clean Water Act encourages compacts between the affected states for the prevention and control of pollution. CWA § 103. Pursuant to this authority, Arkansas and Oklahoma entered into the Arkansas-Oklahoma Arkansas River Compact (Compact), which was approved by both states' legislatures in 1970, and to which Congress had previously consented. OKLA. STAT. tit. 82, § 1421 (1981), ARK. STAT. ANN. §§ 15-23-401, *et seq.*, Pub. L. No. 97, 69 Stat. 184 (1955). The purpose of the Compact is the reduction and prevention of pollution in the Arkansas River Basin, which includes the

Illinois River.³⁰ To resolve disputes between the two states, the Compact creates an Arkansas-Oklahoma Arkansas River Compact Commission ("Commission"). The Commission is authorized to hold hearings and its findings of fact "are admissible into evidence and shall constitute *prima facie* evidence of such fact in any court or before any agency . . ." OKLA. STAT. tit. 82, § 1421, Art. IX(A)(8) (1981).³¹

While Fayetteville's NPDES permit application was pending, Oklahoma requested that the Commission conduct a hearing to investigate the impact of the proposed split-flow on the Illinois River in Oklahoma. The Commission issued its order after two days of hearing.³² Therein, the Commission found that the Illinois River in Oklahoma had undergone a process of degradation in water quality on an "escalating scale" in recent years. R. B-37, ¶ 32-50. After examining the possibility that additional phosphorous from Fayetteville would reach Oklahoma, the Commission entered its unanimous finding:

The potential increase in phosphorus loading to the Illinois River from Fayetteville's proposed discharge could range from 6% to 23% and, further, that the

³⁰ To achieve this goal, Arkansas and Oklahoma mutually agree to:

...

Utilize the provisions of all federal and state water pollution laws and to recognize such water quality standards as may be now or hereafter established under the Federal Water Pollution Control Act in the resolution of any pollution problems affecting the waters of the Arkansas River Basin.

OKLA. STAT. tit. 82, § 1421, Art. VII(E) (1981).

³¹ The Commission is composed of three members from Arkansas, three members from Oklahoma, and, if designated by the President of the United States or an authorized federal agency, one member representing the United States. The directors of the agencies that administer each state's water laws serve as Commissioners.

³² At the commencement of the hearing, the Attorney General of Arkansas stated that since the Compact had the force of federal law, its decisions were controlling on both Arkansas and Oklahoma. R., Ark.-6, Transcript, Vol. 1, p. 24.

potential for or threat of an increased phosphorus loading to the Illinois River from the proposed discharge to the Illinois River in Oklahoma clearly exists. That *should such an impact occur, even if slight in magnitude, further degradation to the Illinois River in Oklahoma will also occur, and such increased degradation will constitute a violation of Oklahoma Water Quality Standards as well as an event of pollution as defined by the Compact.*

Id. at ¶ 73 (emphasis added). The Commission clearly recognized that, given the existing degradation of the River, any additional phosphorous loading from Fayetteville would constitute a violation of Oklahoma's EPA-approved standards.

III. THE TENTH CIRCUIT ACTUALLY NARROWED ITS APPLICATION OF THE OKLAHOMA STANDARDS IN ITS HOLDING AS COMPARED TO THE BROAD MEANING FOUND IN EPA'S REGULATIONS.

The Tenth Circuit did not, as suggested by Arkansas and EPA, engage in an expansive interpretation of the Oklahoma standards that defied EPA policies. Rather, it is EPA's interpretation in the permit proceeding that would not only frustrate the objectives of the Clean Water Act, but which contradicted its own past interpretations and applications of the Oklahoma standards. Further, the Tenth Circuit did not adopt an interpretation of the Oklahoma standards as broad as allowed pursuant to EPA's own regulations. EPA's 1985 Questions and Answers on Antidegradation Policy Statement prohibits any new or point source discharge of waste, on the *presumption* that lower water quality results from such a discharge. And EPA's internal legal memorandum confirms that EPA has interpreted the antidegradation standard to preclude any additional pollutants (presumably even a molecule) from a new or increased point source discharge to reach an outstanding national re-

source water. EPA's "no discharge" prohibition would apply to all the situations covered in the Tenth Circuit's standard, and would also prohibit discharges not reached by the court's standard, such as discharges that would not result in any measurable or observable degradation of a pristine stream, and discharges of pollutants of a type that have not contributed to the degradation of a degraded stream. EPA's broad interpretation fully reflects the basic statutory presumption that the discharge of all pollutants is inherently harmful. CWA § 301.

The Tenth Circuit's application of Oklahoma's anti-degradation standard to this particular permit proceeding has a much more precise focus, and is well within the bounds of EPA's authoritative guidelines and internal legal analysis. The Court's legal standard is limited to a situation where a river is protected by federally-approved standards like Oklahoma's antidegradation policy for outstanding national resource waters and beneficial use limitation, and where the river is already in a degraded state before the new permit is authorized.³³ In such a situation, a new effluent discharge that contains the same pollutants that caused the river's current degradation cannot be permitted, whether or not the new discharge individually creates a detectable adverse impact. P.A. 54a, 79a-89a. There is no conflict between the court's standard and EPA regulations and internal analysis. Rather, the court's standard is a narrow applica-

³³ By requiring that the river already be in a degraded state, or that the new discharge degrade it, P.A. 48a, the Court implies that a *de minimis* exception would be available in a case where a discharge leaves a pristine river in its pristine state. Such a *de minimis* exception, however, would not be available under EPA's guidelines and internal analysis. Moreover, while EPA urges before this Court that a *de minimis* exception should be crafted, the EPA Chief Judicial Officer held such an exception not available under the Clean Water Act. In any event, even if a *de minimis* exception were available, it could not permit new point source discharges of pollutants to reach a previously degraded scenic river, the circumstances present here.

tion of those policies to avoid a result clearly inconsistent with the Clean Water Act.

IV. THE TENTH CIRCUIT CORRECTLY RULED THAT THE PERMIT WAS UNLAWFUL.

A reviewing court should not "rubber-stamp . . . administrative decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983), citing *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965). Here, EPA "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), the existing degradation of the Illinois River in Oklahoma. Due to this fundamental error, EPA issued a permit to Fayetteville, notwithstanding that its discharge would add to the Illinois River the same types of pollutants that had contributed to its existing degradation. EPA's interpretation of the Oklahoma standards—requiring a measurable adverse harm from the addition of an inherently harmful pollutant—would permit backsliding, frustrating and undermining a statute *where every requirement looks towards cleaner water, never backward towards relinquishing pollution control gains*.

To determine the proper legal standard, the court of appeals examined the language of Oklahoma's federally-approved standards, EPA's past interpretation of those standards as applied to the same river, as well as EPA's regulations setting the minimum requirements for state antidegradation policies. Moreover, Oklahoma's interpretation was consistent with EPA's instructions to the states that the antidegradation policy for an ONRW prohibited additional point source discharges that reach the river, as well as with EPA's internal legal analyses. But, the Tenth Circuit narrowed its application, even of the most protective of standards, to a situation where an already degraded scenic river would be reached by addi-

tional discharges containing the same pollutants that had contributed to its degradation.

It is well within the scope of a reviewing court's authority to apply a correct legal standard to the facts. *E.g., FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 454 (1986). In this case, the evidence was unrefuted that the Illinois River was degraded even before the Fayetteville discharge was permitted. P.A. 64a-65a. The court of appeals had before it EPA's finding, unchallenged before this Court, that of the eighteen thousand pounds a year of phosphorous that Fayetteville was authorized to place in a tributary to the Illinois River, twenty to twenty-five percent would be available for algae growth in Oklahoma. P.A. 65a. In such a situation, the permit failed to "insure compliance" with Oklahoma's water quality standards and the court of appeals correctly applied the statutory no discharge prohibition of CWA § 301.³⁴

CONCLUSION

Petitioners, and Oklahoma at times, have characterized this proceeding as a dispute between states. But much more is at stake: the fulfillment of the Clean Water Act's objectives of eliminating the discharge of pollutants and restoring the Nation's waters to their natural state.

³⁴ Arkansas' attack on the Tenth Circuit's opinion is based on a misreading of the Clean Water Act. Oklahoma has not sought, nor does the court's decision provide, an "unfettered veto power" over the Fayetteville discharge into the Illinois River. See Ark. Br., p. 28. But this is not the same as to suggest that a discharger may not comply with federally-approved water quality standards made enforceable through CWA § 301(b)(1)(C). Despite Arkansas' claim that the prohibition on the Illinois River discharge is inimical to the Clean Water Act, "[t]he fundamental premise of the Clean Water Act is that 'the discharge of any pollutant by any person shall be unlawful . . .' *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 109 (D.C. Cir. 1987). In this case, the permit did not insure compliance with Oklahoma's water quality standards, and the permit is therefore unlawful under CWA § 301.

This permit proceeding involves the preservation of the Illinois River, an outstanding national resource water, for which EPA has approved standards prohibiting any degradation. That the river happens to cross a state boundary does not weaken the statutory requirement that Fayetteville comply with that standard. "A River is more than an amenity, it is a treasure."³⁵ In the Clean Water Act, Congress provided a mechanism that requires the preservation and improvement of these treasures. The opinion of the Tenth Circuit should be affirmed.³⁶

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³⁵ *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1965) citing *New Jersey v. New York*, 283 U.S. 336, 342 (1930).

³⁶ The Tenth Circuit ruling, of course, does not prohibit Fayetteville from employing land treatment or other alternative means of disposing of its waste that does not degrade the Illinois River in Oklahoma. The EPA recognized that Fayetteville could be required to implement land application if necessary to protect federally-approved Oklahoma Water Quality Standards. R., A-9. See also *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 587-89 (D.C. Cir. 1980) (Clean Water Act confers on EPA broad powers to insure compliance with applicable water quality standards, including requiring land treatment or other alternative treatment methods); *Rybacheck v. EPA*, 904 F.2d 1276, 1298 n.27 (9th Cir. 1990) (upholding "zero discharge" limitations based on recycling technology).